



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

November 18, 2014 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No. 2011-256

v.

City of Orange (Essex)
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council ("Council") considered the November 10, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council's September 30, 2014 Interim Order because she responded in the extended time frame certifying that she was unable to locate responsive records and could not determine which records were provided to the Complainant. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. This complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) what records Mr. Ditinyak determined to be responsive; 2) which of those records he provided to the Complainant and 3) whether any additional records are outstanding and need to be provided. Further, and if necessary, the Office of Administrative Law should determine whether the original Custodian and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e).

Interim Order Rendered by the
Government Records Council
On The 18th Day of November, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 19, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 18, 2014 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2011-256

v.

**City of Orange (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. Interest amount paid on the City of Orange Bank of America account on fiscal years 2009 and 2010 respectively.
2. Fees paid on the [City of Orange] Bank of America account on fiscal years 2009 and 2010 respectively.

Custodian of Record: Madeline Smith³

Request Received by Custodian: July 5, 2011

Response Made by Custodian: None.

GRC Complaint Received: August 3, 2011

Background

September 30, 2014 Council Meeting:

At its September 30, 2014 public meeting, the Council considered the September 23, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Council should reverse its August 28, 2012 Final Decision at conclusion No. 3 to hold that, instead, the Complainant's OPRA request is valid because the request contained enough identifiers to allow the original Custodian and Mr. Ditinyak to search for and identify responsive records. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the current Custodian must disclose all responsive records with the exception of those previously provided. If the current Custodian cannot determine what

¹ No legal representation listed on record.

² Represented by Avram White, Esq. (Orange, NJ).

³ The original custodian of record was Shinell Smith.

records were previously provided, or if no further records exist, the Custodian must certify to this fact.

2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
3. Since the Council has reversed conclusion No. 2, the Council should abandon its August 28, 2012 Final Decision as to conclusion No. 3 regarding the knowing and willful violation of OPRA.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 1, 2014, the Council distributed its Interim Order to all parties. On October 2, 2014, the current Custodian sought a five (5) business day extension to comply with the Order and further requested that the GRC provide any records it had on file that the Complainant previously received. On October 3, 2014, the GRC granted an extension until October 16, 2014 and also stated that it did not possess any of the records the Complainant may have received.

On October 16, 2014, the current Custodian responded to the Council's Interim Order. The current Custodian certified that, per her January 27, 2014 legal certification, Mr. Ditinyak is no longer with the City. Further, the current Custodian affirmed that she could not determine whether the City obtained all records it deemed to be responsive to the Complainant's OPRA request or whether all such records were provided to the Complainant. The current Custodian certified that she contacted the Finance Department to determine if they possessed any responsive records because none were in the Clerk's Office. The current Custodian affirmed that the Finance Department determined that they possessed no records, so it appears as though none exist.

On October 20, 2014, the Complainant e-mailed the GRC stating that this complaint was remanded to obtain additional facts; however, there appears to be less facts available now than there were at the time of the Council's initial adjudication of this complaint. The Complainant noted that the Council already agreed that more facts were needed to properly adjudicate this

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

complaint, hence the remand. For these reasons, the Complainant requested that this complaint be referred to the Office of Administrative Law (“OAL”) for a fact-finding hearing.

Analysis

Compliance

At its September 30, 2014 meeting, the Council ordered the current Custodian to disclose all responsive records with the exception of those already provided to the Complainant or certify if she could not determine what records were provided, or if no further records existed. Further, the current Custodian was required to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 1, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on October 8, 2014.

On October 2, 2014, the first (1st) business day after receipt of the Council’s Order, the current Custodian sought an extension of time, which the GRC granted until October 16, 2014. Thereafter, on the last day to comply, the current Custodian certified that she was unable to locate any records in the Clerk’s Office or Finance Department and thus, none appear to exist.

Therefore, the current Custodian complied with the Council’s September 30, 2014 Interim Order because she responded in the extended time frame certifying that she was unable to locate responsive records and could not determine which records were provided to the Complainant. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Contested Facts

The Administrative Procedures Act provides that the OAL “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a). In the past, when the issue of contested facts have arisen from a custodian’s compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. *See Hyman v. City of Jersey City (Hudson)*, GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); *Mayer v. Borough of Tinton Falls (Monmouth)*, GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); *Latz v. Twp. of Barnegat (Ocean)*, GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

In this matter, the Council requested remand of this complaint from the Appellate Division to ascertain whether responsive bank records existed. This is because the original Custodian failed to submit an adequate SOI and the City failed to file a brief with the Appellate Division. The Appellate Division granted same, at which point the Council attempted to gain additional information from the City. However, at the time that the complaint was remanded for

adjudication, more than three (3) years had passed and both the original Custodian and Mr. Ditinyak were no longer employed at the City.

In an attempt to gain additional information prior to the Council's Order, the GRC caused Custodian's Counsel to contact Mr. Ditinyak, who purportedly did not recollect which records he determined were responsive or those provided. Counsel noted that Mr. Ditinyak did remember meeting with the Complainant on several occasions. Also, the current Custodian, with limited knowledge of the records which Mr. Ditinyak determined were responsive, and what he previously had acquired and provided to the Complainant; attempted to respond to the Council's request for additional information. The current Custodian, however, was unable to provide any additional facts that would allow the Council to properly adjudicate this complaint. Thereafter, the Complainant requested that this complaint be sent to OAL for a fact-finding hearing because the record was not adequate to adjudicate this complaint.

The SOI and subsequent submissions did provide that, at a minimum, Mr. Ditinyak obtained and provided some records to the Complainant and that others were outstanding. However, the record is insufficient to determine the exact identity or location of those records. Further, the evidence of record does not indicate that the parties communicated with each other in an attempt to determine what records were already provided and whether any further records were outstanding.

The original Custodian and Mr. Ditinyak's acknowledgment of the existence and provision of certain records is a contradiction of the current Custodian's certified statements; though she attempted to at least find responsive records in the Clerk's Office and Finance Department. It is this evidence and the current Custodian's lack of familiarity with the original Custodian and Mr. Ditinyak's actions that have created contested facts in this case. It is henceforth clear that a fact-finding hearing will provide the most efficient and effective method for developing the record and making determinations of fact.

Accordingly, this complaint should be referred to OAL for a fact-finding hearing to determine: 1) what records Mr. Ditinyak determined to be responsive; 2) which of those records he provided to the Complainant and 3) whether any additional records are outstanding and need to be provided. Further, and if necessary, the OAL should determine whether the original Custodian and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's September 30, 2014 Interim Order because she responded in the extended time frame certifying that she was unable to locate responsive records and could not determine which records were provided to the Complainant. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. This complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) what records Mr. Ditinyak determined to be responsive; 2) which of those records he provided to the Complainant and 3) whether any additional records are outstanding and need to be provided. Further, and if necessary, the Office of Administrative Law should determine whether the original Custodian and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

November 10, 2014



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GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

September 30, 2014 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No. 2011-256

v.

City of Orange (Essex)
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council ("Council") considered the September 23, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should reverse its August 28, 2012 Final Decision at conclusion No. 3 to hold that, instead, the Complainant's OPRA request is valid because the request contained enough identifiers to allow the original Custodian and Mr. Ditinyak to search for and identify responsive records. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the current Custodian must disclose all responsive records with the exception of those previously provided. If the current Custodian cannot determine what records were previously provided, or if no further records exist, the Custodian must certify to this fact.
2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. Since the Council has reversed conclusion No. 2, the Council should abandon its August 28, 2012 Final Decision as to conclusion No. 3 regarding the knowing and willful violation of OPRA.

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2011-256

v.

**City of Orange (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. Interest amount paid on the City of Orange Bank of America account on fiscal years 2009 and 2010 respectively.
2. Fees paid on the [City of Orange] Bank of America account on fiscal years 2009 and 2010 respectively.

Custodian of Record: Madeline Smith³

Request Received by Custodian: July 5, 2011

Response Made by Custodian: None.

GRC Complaint Received: August 3, 2011

Background

August 28, 2012 Council Meeting:

At its August 28, 2012 public meeting, the Council considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to the Complainant's request in writing within the statutorily mandated seven (7) business days, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

¹ No legal representation listed on record.

² Represented by Avram White, Esq. (Orange, NJ).

³ The current custodian of record is Shinell Smith.

2. The Complainant's request is invalid under OPRA because it fails to specify an identifiable government record sought pursuant to MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005) and NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007).
3. In the matter before the Council, the Custodian's failure to respond in writing to the Complainant's request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Council finds that Complainant's request is invalid under OPRA because such request fails to name identifiable government records. Accordingly, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Procedural History:

On August 30, 2012, the Council distributed its Final Decision to all parties.

On October 15, 2012, the Complainant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. On October 4, 2013, the Council requested remand of this complaint from the Appellate Division in order to develop the record. The Council's remand request stated that the Statement of Information did not adequately identify whether the bank fee payment records were in the City's possession and further noted that the City failed to file a brief with the Appellate Division. On November 4, 2013, the Appellate Division granted the Council's request for remand.

On January 7, 2014, the GRC requested a response to the following:

1. Whether the City obtained all records Mr. Ditinyak deemed to be responsive to the Complainant's OPRA request? Please provide documentation to support this response.
2. Whether the Complainant was provided with said records? Please provide documentation to support provision of the records.

The GRC, noting that the original Custodian was no longer with the City, requested that the current Custodian and Mr. Ditinyak provide legal certifications and supporting documentation by January 10, 2014.

On January 15, 2014, the City contacted the GRC advising that they recently experienced frequent e-mail outages at the City. On the same day, the GRC resent its request for additional information and extended the time frame to respond through January 21, 2014. The Custodian's Counsel subsequently requested an extension until January 24, 2014, which was granted on

January 16, 2014.⁴ On January 24, 2014, the Custodian's Counsel stated that he spoke with Mr. Ditinyak, who could not remember whether all records determined to be responsive were provided. Counsel noted that Mr. Ditinyak did remember several meetings he had with the Complainant to inspect records.

On January 27, 2014, the current Custodian responded to the GRC's request for additional information. The Custodian certified that Mr. Ditinyak is no longer with the City. The Custodian further certified that she could not determine whether the City obtained all records deemed to be responsive to the Complainant's OPRA request or whether all such records were provided to the Complainant.

Analysis

Reconsideration

The Council "at its own discretion, may reconsider any decision it renders." N.J.A.C. 5:105-2.10(a). Subsequent to the Council's Final Decision, the Appellate Division rendered a decision in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). In light of the Court's reasoning in Burke, on the issue of overly broad OPRA requests, the Council should reconsider its August 28, 2012 Final Decision to determine whether the Complainant's OPRA request was invalid.

The New Jersey Appellate Division has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'*" N.J.S.A. 47:1A-1." MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added). The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

⁴ On January 18, 2014, the Complainant notified the GRC that she filed a notice of petition with the New Jersey Supreme Court on December 2, 2013, disputing the Appellate Division's remand and was awaiting review. The Complainant thus requested that the GRC stay its adjudication until the Supreme Court decided on the petition. On September 15, 2014, the Complainant advised the GRC that the Supreme Court denied her notice of petition. Katalin Gordon v. City of Orange (Essex), 2011-256 – Supplemental Findings and Recommendations of the Executive Director

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). *See also Bent v. Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005),⁵ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

However, in Burke, the Court held that the defendant “performed a search and was able to locate records responsive[,]” which “belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177. *See also Gannett v. Cnty. of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005)(holding that “[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper.”).

Here, the Complainant’s OPRA request sought the “[i]nterest amount paid . . .” and “[f]ees paid on the . . . Bank of America account on fiscal years 2009 and 2010.” On its face, the request sought information and could reasonably have been determined to be invalid. However, the evidence of record indicates that Mr. Ditinyak advised the Complainant on August 26, 2011 that he contacted Bank of America and attempted to obtain analysis of interest revenue and bank expenses. Mr. Ditinyak further advised that he would provide the information he received. On December 3, 2011, the original Custodian advised that she believed the Complainant was in possession of records responsive to half of the OPRA request and that the additional records provided therein should have satisfied the Complainant’s OPRA request. *See Gordon v. City of Orange (Essex)*, GRC Complaint No. 2011-256 (Final Decision dated August 28, 2012) at 2. However, the original Custodian failed to submit a completed SOI and the City did not submit an Appellate brief.

Here, as in Burke, the original Custodian and Mr. Ditinyak undertook the task of responding to the Complainant’s OPRA request. Further, the evidence submitted to the GRC indicates that the original Custodian and Mr. Ditinyak affirmed that, at the very least, some records were provided to the Complainant for review. The GRC recognizes that although the request sought information, the Complainant provided a definitive time frame and financial institution sufficient enough for Mr. Ditinyak to obtain responsive records for disclosure. Thus, the City’s actions here “belied any assertion that the request was . . . overbroad.” *See Burke*, 429 N.J. Super. at 177.

Therefore, the Council should reverse its August 28, 2012 Final Decision at conclusion No. 2 to hold that, instead, the Complainant’s OPRA request is valid because the request contained enough identifiers to allow the original Custodian and Mr. Ditinyak to search for and identify responsive records. Burke, 429 N.J. Super. at 177. Thus, the current Custodian must disclose all responsive records with the exception of those previously provided. If the current Custodian cannot determine what records were previously provided, or if no further records exist, the Custodian must certify to this fact.

Additionally, since the Council has reversed conclusion No. 2, the Council should

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Katalin Gordon v. City of Orange (Essex), 2011-256 – Supplemental Findings and Recommendations of the Executive Director

abandon its August 28, 2012 Final Decision as to conclusion No. 3 regarding the knowing and willful violation of OPRA.

Knowing & Willful

The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council should reverse its August 28, 2012 Final Decision at conclusion No. 3 to hold that, instead, the Complainant's OPRA request is valid because the request contained enough identifiers to allow the original Custodian and Mr. Ditinyak to search for and identify responsive records. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the current Custodian must disclose all responsive records with the exception of those previously provided. If the current Custodian cannot determine what records were previously provided, or if no further records exist, the Custodian must certify to this fact.
2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
3. Since the Council has reversed conclusion No. 2, the Council should abandon its August 28, 2012 Final Decision as to conclusion No. 3 regarding the knowing and willful violation of OPRA.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/
Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Katalin Gordon v. City of Orange (Essex), 2011-256 – Supplemental Findings and Recommendations of the Executive Director



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CHRIS CHRISTIE
Governor

KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No. 2011-256

v.

City of Orange (Essex)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council ("Council") considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to the Complainant's request in writing within the statutorily mandated seven (7) business days, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant's request is invalid under OPRA because it fails to specify an identifiable government record sought pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
3. In the matter before the Council, the Custodian's failure to respond in writing to the Complainant's request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Council finds that Complainant's request is invalid under OPRA because such request fails to name identifiable government records. Accordingly, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 28th Day of August, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2011-256

v.

**City of Orange (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. Interest amount paid on the City of Orange Bank of America account on fiscal years 2009 and 2010 respectively.
2. Fees paid on the [City of Orange] Bank of America account on fiscal years 2009 and 2010 respectively.

Request Made: July 5, 2011

Response Made:

Custodian: Shinell Smith

GRC Complaint Filed: August 3, 2011³

Background

July 5, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

August 3, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with an attached copy of the Complainant's OPRA request dated July 5, 2011.

The Complainant states that she submitted her request on July 5, 2011 and has waited patiently for an answer. The Custodian maintains that on August 1, 2011, she met with the City of Orange's Director of Finance, John Ditinyak. The Complainant asserts that Mr. Ditinyak informed her that although he is aware of OPRA's time limitations, he is not committing himself to a timeframe upon which to respond to her Denial of Access Complaint. The Complainant states that this interaction led her to file this complaint.

The Complainant agrees to mediate this complaint.

¹ No legal representation listed on record.

² Represented by Marvin T. Braker, Esq. (Orange, NJ).

³ The GRC received the Denial of Access Complaint on said date.

August 3, 2011

Offer of Mediation sent to the Custodian.⁴

August 26, 2011

Letter from Mr. Ditinyak to the Complainant. Mr. Ditinyak states that he has contacted the City's representatives at the Bank of America in order to retrieve an analysis of interest revenue and bank expenses. Mr. Ditinyak asserts that he will provide the Complainant with such information when he receives it. Mr. Ditinyak states that he is sorry for the delay and maintains that he has acted in good faith in providing an estimated delivery time for the requested records.

August 15, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

November 21, 2011

E-mail from the Custodian to the GRC. The Custodian states that due to staffing changes, she did not receive the GRC's request for the SOI at the time of such request, August 15, 2011. The Custodian requests a two week extension to complete the SOI.

November 21, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian the requested extension to submit the SOI.

December 3, 2011

E-mail from the Custodian to the Complainant. The Custodian states that she was informed by Mr. Ditinyak that the Complainant had already received records responsive to the first half of her request. The Custodian asserts that the Complainant has spent several hours in the Clerk's office reviewing various records. The Custodian further states that Mr. Ditinyak was unable to fulfill this request because the City auditor never gave Mr. Ditinyak a response to the Complainant's forwarded request.

The Custodian states that the files attached to this e-mail should satisfy the Complainant's request.

December 7, 2011⁵

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 5, 2011
- Letter from Mr. Ditinyak to the Complainant dated August 26, 2011
- E-mail from the Custodian to the Complainant dated December 3, 2011

⁴ The Custodian did not respond to the Offer of Mediation by the August 10, 2011 deadline.

⁵ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007). The Custodian also declined to respond to the questionnaire contained in the Statement of Information form.

- A copy of the Complainant's Denial of Access Complaint dated August 3, 2011

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Complainant filed an OPRA request on July 5, 2011. However, the Custodian failed to bear the required burden of proof under N.J.S.A. 47:1A-6 that she provided a written response to the Complainant's request within the statutorily mandated seven (7) business days. Accordingly, the Custodian's failure to respond in writing to the Complainant's request is in violation of OPRA.

Therefore, because the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to the Complainant's request in writing within the

⁶ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

statutorily mandated seven (7) business days, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*..." (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

Moreover, OPRA provides that:

"Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5.e.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

In the instant matter, the Custodian failed to fully complete the Statement of Information. Accordingly, the Custodian has failed to meet her statutory burden of proof that the denial of access was lawful, as required pursuant to N.J.S.A. 47:1A-6. However, in this particular instance, the Custodian's ability to raise an argument justifying the alleged denial of access is of no consequence because the Complainant's request is invalid on its face.

In the matter before the Council, the Complainant requested the "interest amount paid on the City of Orange Bank of America account on fiscal years 2009 and 2010 respectively" and the "fees paid on the [City of Orange] Bank of America account on fiscal years 2009 and 2010 respectively." Such a request merely seeks information and fails to request a specifically identifiable government record.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁸

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A.

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, *supra*.

47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..." Accordingly, test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA.

In the instant matter, the Complainant's request does not seek a specifically identifiable record. Instead, the Complainant merely requests the amount of interest and fees paid on the City's Bank of America account. Such a request fails to identify a specific government record with reasonable specificity. Accordingly, the Complainant's request is invalid under OPRA.

Therefore, the Complainant's request is invalid under OPRA because it fails to specify an identifiable government record sought pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances,

the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian’s failure to respond in writing to the Complainant’s request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Council finds that Complainant’s request is invalid under OPRA because such request fails to name identifiable government records. Accordingly, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to the Complainant’s request in writing within the statutorily mandated seven (7) business days, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant’s request is invalid under OPRA because it fails to specify an identifiable government record sought pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

3. In the matter before the Council, the Custodian's failure to respond in writing to the Complainant's request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Council finds that Complainant's request is invalid under OPRA because such request fails to name identifiable government records. Accordingly, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012